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# Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice — Some Observations and Questions of an Emerging Phenomenon

Gerald Torres\*

*[C]onsider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object.*

— C.S. Peirce<sup>1</sup>

*No particular results then, so far, but only an attitude of orientation, is what the pragmatic method means. The attitude of looking away from first things, principles, "categories," supposed necessities; and of looking towards last things, fruits, consequences, facts. . . . [The] pragmatist talks about truths in the plural. . . .*

— W. James<sup>2</sup>

*My single mistake has been to seek an identity with any one person or nation or with any part of history. . . . What I see now, on this rainy day in January, 1968, what is clear to me after this sojourn is that I am neither a Mexican nor an American. I am neither a Catholic nor*

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\* Professor of Law, University of Minnesota; Visiting Professor of Law, Harvard Law School. This Essay is based on a talk given at the 1991 Conference of the Association of American Law Schools. Many of the themes in this Essay remain to be developed.

1. Peirce, *How to Make Our Ideas Clear*, in *VALUES IN A UNIVERSE OF CHANCE* 124 (1958).

2. James, *What Pragmatism Means*, in *PRAGMATISM: THE CLASSIC WRITINGS*, 209, 214, 220 (H. Thayer, ed. 1970). Compare this formulation with that suggested by E.P. Thompson:

But outside the university precincts another kind of knowledge-production is going on all the time. I will agree that it is not always rigorous. I am not careless of intellectual values nor unaware of the difficulty of their attainment. But I must remind a Marxist philosopher that knowledges have been and still are formed outside the academic procedures. Nor have these been, in the test of practice, negligible. They have assisted men and women to till the fields, to construct houses, to support elaborate social organizations, and even, on occasion, to challenge effectively the conclusions of academic thought.

E.P. THOMPSON, *THE POVERTY OF THEORY & OTHER ESSAYS* 8 (1978).

*a Protestant. I am a Chicano by ancestry and a Brown Buffalo by choice.*

— O.Z. Acosta<sup>3</sup>

Think about justice. When I say the word "justice," how do you understand it? Do you conceive of it as representing a single thing? How is your conception of justice formed? What stands behind your conception of justice? What background highlights the features of your conception of justice? I think it important to start by questioning our conceptions of justice because doing so highlights both the difficulty and importance of my task. That task is to demonstrate that at least two of the goals of the civil rights movement may be incompatible, at least as they are commonly understood.

The claim for justice at the heart of the civil rights movement had moral force because it was the demand for a single thing: that differently situated people be treated fairly and equally.<sup>4</sup> But our allegiance to pluralism, a concept implicit in the mapping of our political universe, may equally be loyalty to a single thing. Justice, as it has taken concrete form in our civil rights jurisprudence, may require a weak form of pluralism, or a strong form of pluralism may require many kinds of justice.

Pluralism is the concept that has come to define culture and ethnicity within our legal system. Pluralism is not a "thing," however, but an approach to politics and, through politics, law. According to at least one version of our political story, the evolution of our law reflects the continued moral progress of our society.<sup>5</sup> To the extent that the law also reflects at least one version of the social consensus on justice, the moral progress also reflects an evolution towards a more just society. Because our society not only projects our culture but also expresses and creates it, we would expect evolving notions of cultural pluralism to be reproduced in politics and in law.

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3. O.Z. ACOSTA, *THE AUTOBIOGRAPHY OF A BROWN BUFFALO* 199 (1972). Compare Acosta's vision with that of Richard Rodriguez in R. RODRIGUEZ, *THE HUNGER OF MEMORY: THE EDUCATION OF RICHARD RODRIGUEZ* 28-40, 58-73 (1982).

4. I recognize that this characterization is unfair to the complexity of the civil rights movement, but it does capture the essence of the initial claim for "equal rights" as citizens. I realize many in the civil rights movements articulated "justice" as more than the call for equality of opportunity; it was also the call for a more transformative elimination of all the socially constructed barriers to equal results. See, e.g., Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (1990).

5. See, e.g., A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 19 (1978); G. GILMORE, *THE AGES OF AMERICAN LAW* 4, 101-04 (1977).

Particularity may be celebrated but, in keeping with James and Peirce, the question remains just what is being celebrated. My premise is that "community,"<sup>6</sup> characterized as "democratic pluralism," has become the conceptual link between competing particularities and the existence (or hoped for existence) of a universal social, political, economic and "ethnic" American Culture. The deployment of "community" as a substitute for "cultural pluralism" within the structure of existing political discourse has the effect of denying cultural differences by defining pluralism as a purely political category.

An initial question, then, is what is the difference between cultural pluralism and political pluralism? In the context of contemporary political discourse, cultural pluralism does not exist outside the realm of a cultural difference that is expressed in terms of interest groups or as a marginalized non-threatening other. Virginia Governor Douglas Wilder and the Reverend Jesse Jackson have demonstrated that culturally subordinated people can only have their interests heard by collapsing the broader goals of "cultural liberation," as haltingly expressed in the civil rights movement, into the structure of major party interest group coalition building. The recent re-election campaign of North Carolina Senator Jesse Helms demonstrated that, to secure a polity free from the voice of the dispossessed, all that is needed is to raise the specter of an alien threatening other.<sup>7</sup> Thus, political pluralism, as currently understood, has no room for the full expression of the culturally distinct needs

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6. Community refers here to the idealized polity within which differences are regulated by reference to a common understanding of the general good. Community as a virtue shows up in the current literature surrounding "civic republicanism" and in the dialogic left. See Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Non-White Underclass*, 78 *GEORGETOWN L.J.* 1929, 1937-39 (1990); *infra* notes 12-13.

7. Newspaper accounts of Senator Helms's stump speeches, alleging that his opponent Harvey Gantt was fundraising in the bars of San Francisco, combined with his television advertisement suggesting that quotas would deny deserving white men of their jobs created an electoral climate of "us versus them," with very little question about who the "them" was. The television advertisement was captured well in this report:

In the TV spot, the camera focused in on the hands of a white man wearing a wedding ring crumpling up what is apparently a job rejection letter.

As dramatic music played in the background a voice said: "You needed that job. And you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair? Harvey Gantt says it is. Gantt supports Ted Kennedy's racial quota law that makes the color of your skin more important than your qualifications."

of subordinate groups. Those groups only have expression to the extent that they translate their needs into the language of "interests." By restricting the claims of subordinate groups to "interests," political discussion on the construction of "the good" is severely limited. "The good," as the term is commonly used, refers to the construction of the context within which rights (and thus first order interests) may be asserted and contested. By constraining a reconstruction of "the good," "interests" will continue to be defined in terms congenial to the continued domination by those who control the distribution of social goods.<sup>8</sup> The technique is formal neutrality as to "interests." Thus, according to this understanding, both procedural and normative barriers exist in contemporary political discourse to the inclusion of those who would seriously destabilize the current distribution of political power.

The "cultural nationalism" that emerged toward the end of the resurgent mass civil rights movement was an attempt to construct an antagonistic cultural foundation that would facilitate the assertion of claims by those whose "interests" were first given voice within the context of "civil rights." Stokely Carmichael (now known as Kwame Toure), one of the original proponents of Black Power, put it this way:

"Integration" as a goal today speaks to the problem of blackness not only in an unrealistic way but also in a despicable way. . . . [It] reinforces, among both black and white, the idea that "white" is automatically superior and "black" is by definition inferior. . . .

"Integration" also means that black people must give up their identity, deny their heritage. . . . The fact is that integration, as traditionally articulated, would abolish the black community. The fact is that what must be abolished is not the black community but the dependent colonial status that has been inflicted upon it.<sup>9</sup>

Cultural nationalism thus opposed civil rights as a definition of the political program that subordinate groups should follow.

Mandel, *Quotas: A Potent but Perilous Political Issue*, Investor's Daily, Nov. 23, 1990, at 32, col. 1. Gantt opposed job quotas.

A Washington Post editorial noted:

In the closing days of his campaign, Helms appealed not only to racism but to homophobia as well. He accused his opponent, Harvey Gantt, of accepting money from gay groups — funds raised, Helms said, in gay bars. "Why are homosexuals buying this election for Harvey Gantt?" a Helms newspaper ad asked. . . .

Cohen, *Helms the Hater*, Wash. Post, Nov. 8, 1990, at A31, col. 1.

8. "[T]he right to decide what is true is not independent of the right to decide what is just." J. LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* 8 (1984).

9. S. CARMICHAEL & C. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 54-55 (1967).

Those within conventional political discourse perceived as deeply threatening the idea that groups want to participate in the social life of the "nation," yet stand aloof from the demands that differentiating characteristics be discarded. We saw the response to the threat in the state sanctioned violence that was meted out against black people and native people, and we continue to see it today in the "English only" movement. The inchoate cultural nationalism of that age might be understood as a response of members of a group who were the objects rather than the subjects of social change.

By declaring that a cultural foundation was necessary for the political changes that were proposed during the struggle against Jim Crow, elements within the civil rights movement attempted to articulate the notion that recognition and preservation of group membership is important to community building and to the creation of justice. "Justice is neither a term of explanation nor of classification, but of experience."<sup>10</sup> The experience of justice is not just a residue, however, but the sense that we have participated in the system that both defines and creates it.

This construction raises the critical question of how these concepts of cultural and political pluralism differ from mere interest-group pluralism? Is group integrity essential to the process of the creation and definition of a just society?<sup>11</sup> As Frank Michelman,<sup>12</sup> among others,<sup>13</sup> has demonstrated in his recent work, both the republican ideal (as reconstituted in the "new civic republicanism") and the strongly liberal-pluralist strains in American political consciousness start from an unstated, but common assumption: that the definition of citizenship presupposes a general, as opposed to particular, will and that this generality requires that the law be blind to group interests, at least where the group is smaller than the nation and where recognizing the "subgroup's" legitimacy risks undermining the solidarity of the state. I do not mean to understate the tension

10. Torres & Brewster, *Judges and Juries: Separate Moments in the Same Phenomenon*, 4 LAW & INEQUALITY 171, 187 (1986).

11. See Kymlicka, *Liberalism, Individualism, and Minority Rights*, in LAW AND THE COMMUNITY: THE END OF INDIVIDUALISM? 181 (1989); Torres & Milun, *Translating Yonnonديو by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 654-59.

12. See Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 445-47 (1989).

13. See, e.g., Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1555-58, 1569 (1988); Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1714, 1716 (1988).

between republicanism of either the new or old variety and liberal-pluralism with this characterization.

This common assumption has two very broad implications for politics and law. First, our identity (and thus our interests) is rooted in some broad culture defined by the political contours of our present nation state. Second, to the extent that there are contests over that identity and shares of goods that are distributed socially, we define ourselves in terms of shifting interest groups. These interest groups are largely affiliational. We choose to commit to them or not. Mostly, however, we do not.<sup>14</sup> Even groups based on filiation are either redefined to fit the affiliational model or marginalized.<sup>15</sup>

The interest-group model of politics is based upon an essentially privatized contractual model of social life within the context of a dominant political ethos. The ethos might be defined as the general commitment to public fair play. Each undifferentiated citizen must be treated like every other, and we all have the opportunity to affiliate in order to exercise state power to our advantage within constitutionally defined boundaries. Within the procedurally defined boundaries of "fair play," however, affiliated citizens struggle through the representation of their interest to achieve the maximum benefit regardless of the social cost. The theory obviously encompasses cost shifting as a major strategy. Since the cipher-citizen can shift from alliance to alliance as opportunity and need present themselves, costs will only weigh most heavily on those who are unpersuasive and choose to remain in a losing arrangement. Both the pressures of the republican model and of the liberal-pluralist interest group model aim to strip unimportant features like race or ethnicity or gender from the definition of citizen-participant.

Interest group pluralism begins from these premises. Under this view, as Iris Young puts it, "Friends of the Whales, the National Association for the Advancement of Colored People, the National Rifle Association, and the National Freeze Campaign all have the same status, and each influences decisionmaking to the degree that their resources and ingenuity can win out in the competition for policymakers' ears."<sup>16</sup> The

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14. Take, for example, the pejorative content in conventional political discourse of the phrase "Special Interests."

15. Useful examples are the Sons of Italy or the Black Panthers. Discussions with Kendall Thomas have been very helpful on this point.

16. Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 266 (1989).

main effort of the opponents of the Civil Rights Movement is to characterize the movement for "equal rights" as just another special interest group. This restructuring of the debate both debases the nature of the claims that have evolved in the civil rights struggle and disguises the efforts of "racial management" that characterizes current state policy toward minority groups.<sup>17</sup>

My view of cultural/political pluralism starts from a different premise. Turn again to Iris Young for a preliminary statement, but remember her definition here is still one of political rather than cultural pluralism:

By an interest group I mean any aggregate or association of persons who seek a particular goal, or desire the same policy, or are similarly situated with respect to some social effect — for example, they are all recipients of acid rain caused by Ohio smokestacks. Social groups usually share some interests, but shared interests are not sufficient to constitute a social group. A social group is a collective of people who have affinity with one another because of a set of practices or way of life; they differentiate themselves from or are differentiated by at least one other group according to these cultural forms.<sup>18</sup>

The basic idea is that cultural groupings, as I have defined them elsewhere,<sup>19</sup> may have distinct interests in common, but it is not those interests that define them. To reduce those groupings to the political expression of their interests in the sense Young uses is to debase the culture that supports and identifies the group. Thus, to say that a cultural subgrouping is merely an interest group is to assume from the outset that the political expression of the groups' cultural life captures the essence of the collectivity and defines any particular member of the group. Such a move, of course, protects the dominant cultural grouping from confronting a destabilizing "other," and forces the subordinate group to adopt the dominant groups' definition of themselves if they wish to share in the distribution of social goods. This process, while structurally concealing the translation at work, formally provides "groups" with a model of participation in the discourse of the polity. Under this model, however, it is a discourse of exclusion.

To the extent that the above description captures in a schematic fashion the complexity of the social relations that have produced the specific historical forms that "pluralism" has

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17. See Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV. 1043, 1062-68 (1988).

18. I. M. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 186 (1990).

19. See Torres, *supra* note 17, at 1061-66.



taken, specific attention must be paid to the ideological structures that mask systemic domination and subordination. Any theorizing about structures of domination and subordination must recognize that no system is a seamless web. Every system is a living system composed of actors engaged in the construction of "everyday life." Any analysis of "cultural pluralism" as a potentially viable form of political pluralism must recognize the oppositional content of everyday resistance. Much of this resistance will be partial and found in the marginal spaces of the dominant culture and society. Mere marginality must not be valorized as such, however, since the margins may be where resistance occurs, but marginality is not resistance in itself.

For the benefits of marginality to be reaped, marginality must in some sense be chosen. Even if, in one's own individual history, one experiences one's patterns of desire as given and not chosen, one may deny, resist, tolerate or embrace them. One can choose a way of life which is devoted to changing them, disguising oneself or escaping the consequences of difference, or a way of life which takes on one's difference as integral to one's stance and location in the world. If one takes the route of denial and avoidance, one cannot take difference as a resource. One cannot see what is to be seen from one's particular vantage point or know what can be known to a body so located if one is preoccupied with wishing one were not there, denying the peculiarity of one's position, disowning oneself.<sup>20</sup>

To remain critical, however, theorizing about pluralism or marginality must remain rooted in an historically specific practice and must reject the notion of the representative intellectual.<sup>21</sup> No theory can be applied without modification to the field of study for which it was constructed, since the objects of that study are constantly creating ways of knowing and patterns of being. A critical theory will accept the notion that various autonomous and competing groups will have to cooperate in ways that support the integrity of the various groups within the polity without using the concept of polity to collapse real differences. These competing groups will be both cultural, in a broad

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20. M. FRYE, *THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY* 149-50 (1983).

21. Questions about the role of the intellectual in social movements has a history dating at least back to Marx. Italian Marxist Antonio Gramsci developed the idea of "organic intellectuals," who viewed themselves not as members of a separate, detached, reflective community, but who were instead intimately linked to the social class from which they came. This connection informed their intellectual work. For a version of this analysis in the legal context, see Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *WOMEN'S RTS. L. REP.* 7, 7-10 (1989) and Matsuda, *Looking to The Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.-C.L. L. REV.* 323, 324-26, 362-63 (1987).

sense, and political, in a narrow sense. Recreating a theory of pluralism will entail escaping the decentering and deculturizing nature of conventional contemporary pluralism. Theorizing must reject the idea of a trans-historical subject of politics.

The struggle is against domination and for autonomy and thus a theory must specify each without privileging a specific version by reference to a trans-historical subject. Resistance at the margin is never "for itself," because the specific actors are never "for themselves" as historical individuals, but are linked with others and the others define the individual. Nonidentity is presumed in identity, the subject and the object are always one. Difference within the subject is never overcome or suspended. Difference is merely repressed through social and discursive power. Looking at the idea of equality illustrates this point.

Equality has been interpreted in our law as sameness: those who are similarly situated should be treated similarly; the same things should be treated the same.<sup>22</sup> This construction, while formally attractive, submerges much that is both interesting and important about the question of equality. It transforms similarity into sameness. Equality, as the post-modernists<sup>23</sup> have shown us, has at least two important meanings for the law. First, there is the idea of identity: These things (or people, or situations) are the same; therefore, they should be treated the same. (This construction is contained within the ideal of universal citizenship.) Second, is the idea of equivalence: In some important respects — that is, from an intersubjective perspective — these two things or these two people are sufficiently similar to require equivalent treatment. Equivalence does not require identical treatment, but requires that treatment take into specific account the subject's particularity.<sup>24</sup>

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22. See, e.g., Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 539-40 (1982).

23. For an interesting discussion and critique of post-modernism, see D. HARVEY, *THE CONDITION OF POSTMODERNITY* (1989).

24. See, e.g., C. MACKINNON, *FEMINISM UNMODIFIED* 37 (1987):

I will also concede that there are many differences between women and men. I mean, can you imagine elevating one half of a population and denigrating the other half and producing a population in which everyone is the same? What the sameness standard fails to notice is that men's differences from women are equal to women's differences from men. There is an *equality* there. Yet the sexes are not socially equal. The difference approach misses the fact that hierarchy of power produces real as well as fantasied differences, differences that are also inequalities. What is missing in the difference approach is what Aristotle missed in his empiricist notion that equality means

The term "post-modernism" has been used to express dismay over the collapse of modernism, as well as to express hope over the decline of totalizing modes of description and explanation. The post-modern critique begins with the admonition to guard against attempts to ground value in any foundationalist or basic normative conception like humanity, nature, or reason. Post-modern theorists insist on the local contingency of value. One way out of the problem of contingency is to adopt a position that grounds value in "interpretive communities."<sup>25</sup> Maintaining the integrity of local communities of meaning grounds the intellectual within the social needs of the community.<sup>26</sup>

Jean-Francois Lyotard, a central figure in the current debate over post-modernism, contrasts the "grand narratives" that attempt to unify all of human history within the story of emancipation (the promise of the Enlightenment and the French and American Revolutions) with the language games that control the interpretive integrity of local communities.<sup>27</sup> Lyotard, in exploring the "differend,"<sup>28</sup> looks to those situations where power and language intersect. As he puts it: "[Every] phrase, even the most ordinary one, is constituted according to a set of rules (its regimen). . . . Phrases from heterogeneous regimens cannot be translated from one into the other."<sup>29</sup> Pretending that they can be translated with no dam-

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treating likes alike and unlikes unlike, and nobody has questioned it since. Why should you have to be the same as a man to get what a man gets simply because he is [a man]? Why does maleness provide an original entitlement, not questioned on the basis of *its* gender, so that it is women — women who want to make a case of unequal treatment in a world men have made in their image (this is really the part Aristotle missed) — who have to show in effect that they are men in every relevant respect, unfortunately mistaken for women on the basis of an accident of birth?

25. S. FISH, IS THERE A TEXT IN THIS CLASS? 303-21 (1980).

26. See, e.g., R. RORTY, CONTINGENCY, IRONY AND SOLIDARITY (1989). For a critical review of Rorty's project, see West, *The Politics of American Neo-Pragmatism*, in POST-ANALYTIC PHILOSOPHY 259 (1985).

27. J. LYOTARD, *supra* note 8, at 23-27.

28. Lyotard defines "the differend" as "a case of conflict, between (at least) two parties, that cannot be equitably resolved for lack of a rule of judgment applicable to both arguments." J. LYOTARD, THE DIFFEREND xi (1988).

29. *Id.* at xii. "Phrase" is defined this way:

Phrase: . . . the English cognate has been used throughout rather than the semantically more correct *sentence* for a number of reasons. The term, as Lyotard develops it here, is *not* a grammatical — or even a linguistic — entity (it is not the expression of one complete thought nor the minimal unit of signification), but a *pragmatic* one, the concern being with the possibility (or impossibility) of what can (or cannot) be "phrased," of what can (or cannot) be "put into phrases." . . . A phrase is defined by — as it, in fact, defines — the situating of its

age to the structure of meaning underlying the disputes is to presume the legitimacy of one perspective and the illegitimacy of the other. More than that, however, where cultural differences are at stake, the definition of the local community is central. An attempt to universalize the narrative by universalizing cultural discourse suspends the capacity of the subordinate group even to argue for their exclusion.<sup>30</sup> He notes that “[a] case of differend between two parties takes place when the ‘regulation’ of the conflict that opposes them is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom.”<sup>31</sup> Lyotard distrusts the “integrity of interpretive communities” as much as the “tendency toward totalizing explanation.”<sup>32</sup>

By constituting themselves as separate “language games,”<sup>33</sup> the various and competing spheres of cultural knowledge seek to maintain their autonomy and explanatory power. The function of these language games is to keep cultural values from infecting the separate realms of politics and economics and to disguise the pervasive role of power in the various realms of cultural discourse.<sup>34</sup> An attempt to de-culturalize a discourse is an attempt to understand the conceptions within that discourse as “pure.” This purity is a resurrection of the claim to a universalizing (or totalizing) explanatory power within a distinct or, at least, relatively autonomous realm.<sup>35</sup> To struggle against the power displaced in language games that disguise the differend is to struggle against what Gramsci called the hegemony of everyday life through which social and economic relations are enforced, amplified and contested.<sup>36</sup> Lyotard recognizes that this process is part of the practice of politics. We live our lives in a series of separate realities and in each one of those spaces a spe-

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instances (addressor, addressee, referent, sense) with regard to one another. Rather than defining a grammatical or semantic unit, a *phrase* designates a particular constellation of instances, which is as contextual as it is textual — if it is not indeed precisely what renders the “opposition” between text and context impertinent.

*Id.* at 194.

30. *See id.* at 157.

31. *See id.* at 9.

32. *See* J. LYOTARD, *supra* note 8, at 11-41 (discussing the strengths and weaknesses inherent in each model of knowledge).

33. *Id.* at 62.

34. *Id.* at 64.

35. *See id.* at 62.

36. Gramsci's notion of hegemony is discussed in Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*, 90 AM. HIST. REV. 567, 568-71 (1985).

cific kind of politics is possible. The multiple possibilities for action across different discursive realms is a direct refutation of the notion that there is a single sense of politics or single strategic political idea.

Constituting the post-modern in opposition to the modern or to the metaphysical is a counter-hegemonic act.<sup>37</sup> It is an oppositional practice. The ensemble of social and linguistic relations that constituted the "modern" acted to mask social difference. Yet, if theorizing the post-modern is to constitute a counter-hegemonic activity, then it must be done with a clear understanding of the historical specificity of our own cultural practices and with the aim of bringing the practices of our discipline in line with oppositional forces in society that are struggling against the various forms of cultural domination. How do we transform our practices and what will post-modern legal theorizing look like? Lyotard would suggest that the answers to those questions cannot be pre-determined. However, until critics of the dominant discourse position themselves within the structures they hope to transform, they cannot hope even to identify the differend or to respond to the totalizing impulses of every specific language game. Thus, current "theory" is necessarily inadequate to the task, especially if it locates itself within a universalizing story of emancipation. For example, Marxism

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37. Hegemony is a term with a complicated lineage and it is often used in contradictory ways. In the sense that I mean it here, hegemony might usefully be compared to Lyotard's idea of terror. Lyotard argues that:

Within the framework of the power criterion, a request (that is a form of prescription) gains nothing in legitimacy by virtue of being based on the hardship of an unmet need. Rights do not flow from hardship, but from the fact the alleviation of hardship improves the system's performance. The needs of the most underprivileged should not be used as a system regulator as a matter of principle: since the means of satisfying them is already known, their actual satisfaction will not improve the system's performance, but only increase its expenditures. The only counterindication is that not satisfying them can destabilize the whole. It is against the nature of force to be ruled by weakness. . . .

Such behavior is terrorist . . . . By terror I mean the efficiency gained by eliminating, or threatening to eliminate, a player from the language game one shares with him. He is silenced or consents, not because he has been refuted, but because his ability to participate has been threatened (there are many ways to prevent someone from playing). The decision makers' arrogance, which in principle has no equivalent in the sciences, consists in the exercise of terror. It says: "Adapt your aspirations to our ends — or else."

J. LYOTARD, *supra* note 8, at 62-64 (footnotes omitted).

A counter-hegemonic act resides in the destabilization of the system that excludes the "unmet need."

is inadequate not just because it has failed materially in Eastern Europe, but because it partook of the oppressive ideal of a single historical subject. No single ruling discourse of social life or autonomy is possible or even desirable.

To argue that pluralism requires multiplicity of voices for liberation to remain relatively autonomous seems to invite chaos. But to reject that conception in favor of some version of homogeneity is a nostalgic and totalizing vision. Multiplicity implies a decentralized ideology and economy and, ultimately, a non-hierarchical culture. Yet, this post-modern vision is not one that suggests either the pure determinism of culture nor the pure autonomy of voluntary association. Post-modernism requires building from the micro-politics of opposition to an opposition that can challenge the extant distribution of power, but not to establish an alternative hegemonic structure. A post-modern discourse of justice rejects that as a goal. Theory does not precede ideology and thus the eclecticism of theory mirrors the historical specificity of the project of building a post-modern politics. This is one of the problems that Lyotard confronted as a form of both "narrative solidarity" and "essentialism."

Marilyn Frye, in *The Politics of Reality*, reports enjoining men to think about how to stop being men, and when thinking about her whiteness she enjoins herself to stop being white.<sup>38</sup> Yet how does one stop being "white" or how does a man stop being a "man"? Frye's remonstrance highlights the problem in any theory of pluralism: filiation versus affiliation both for being and for action. Her injunction also throws into relief Lyotard's notion of the determinative power of narrative structures. There are groups to which we belong or, perhaps more descriptively, into which we are thrown. A mere act of will cannot disaffiliate us from these groups. Even our attempt to hold ourselves apart merely reconfirms our membership.<sup>39</sup>

To take Frye's categories as examples, a man is both male biologically described, and male socially described. Every man is a member of both groups. Feminists like Frye and Professor

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38. M. FRYE, *supra* note 20, at 127.

39. See, e.g., S. STEELE, THE CONTENT OF OUR CHARACTER 70-75, 93-109 (1990) (discussing the conflict between racial and individual aspects of identity and tension between raceless class values and patterns of racial identity); Carter, *The Best Black*, 1 RECONSTRUCTION 6, 7 (1990) (discussing the "Best Black" syndrome that sets some blacks apart from the rest of their culture, yet reinforces their membership).

Catharine MacKinnon<sup>40</sup> distinguish between the two categories and argue that the socially constructed category "male" describes a fully articulated view of the world and the subject's place in it. Short of a sex-change operation, the biological determinant remains unchangeable, but it does not determine the social content of maleness. Biologically *and* culturally, men are thrown into the category "male." To "stop being a man," in the sense that Frye intends, means critically to evaluate the privileges and political views and positions that are attendant to the role. Yet it also means to understand politics *as a man*. From this perspective a "male" can choose to act in ways that reinforce structures of privilege and domination or he can oppose them, but he cannot escape his grouping with other men. Similarly, when Frye struggles with racism from the perspective of her whiteness she can reject the impulse to act in ways that reinforce the privilege of "whiteness," but she must do so from the perspective that her situation entails.<sup>41</sup> The quotation from Acosta at the beginning of this Essay states in very personal terms the conflict and promise in recognizing how we can convert filiation into affiliational terms; it also illustrates the problem of the differend.<sup>42</sup>

The determinative power of narrative structures arises when either one or the other definition of group structure and membership is given priority. Among the practical problems facing Critical Race Theory or Critical Pluralist Theory is how to regulate the conflicting idioms in a way that does not depend upon a universalizing norm or vision of the good.<sup>43</sup> These theorists need to reform conceptions of democratic representation in a way that supports the underlying legitimizing justifications of democracy without systematically repressing the capacity for minority self-determination. There must be strong democratic support for group difference and, from those differences, complex equalities. The interest group model of representation described fails in this task. A pure majoritarian model would also

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40. C. MACKINNON, *supra* note 24, at 54-55.

41. *See, e.g.*, Peller, *supra* note 4, at 839-40 (discussing psychological forces driving white progressives and liberals to advocate integration).

42. *See supra* text accompanying note 31.

43. Linda Hirschman, in an interesting article, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983 (1990), struggles with the "pre-modern" foundations for defining the good. *Id.* at 998-1002. In doing so, she attempted to construct redistributist claims within the context of existing American culture. *Id.* at 1011-22. Her explication of the good life remains resolutely flexible within the redistributist ideal.

fail where it does not give weight to culturally specific definitions of the good.

I began by asking whether justice could be conceived of in the plural. In this Essay, I have tried to suggest why, by and large, the answer has been no. The answer has been "no" because of the assumption that all cultural differences that matter are either outside the idiom of politics or else are convertible into the form of interest group discourse that represses differences that matter. The dilemma is tragic and old.

The tragic consists of a legal double bind. Antigone, Creon, Oedipus, Agamemnon, Eteocles — all owe allegiance to both the edicts of their city and to the customs of their family lineage. Living under this tragic double bind is unbearable, which is why each of them chose *his* or *her* univocal law. . . . Their denial of the conflicting law proves however hubristic.<sup>44</sup>

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44. Shurmann, A Brutal Awakening to the Tragic Condition of Being: On Heidegger's *Beitrage zur Philosophie*, in *Art, Politics, and Technology: Martin Heidegger 1889-1989 an International Colloquium at Yale* (K. Harries ed. 1992) (forthcoming).



